

Varinderpal Kaur (Migration) [2022] AATA 1388 (22 April 2022)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mrs Varinderpal Kaur

REPRESENTATIVE: Mr Dhaval Rajendra Mandan (MARN: 1797268)

CASE NUMBER: 1820518

HOME AFFAIRS REFERENCE(S): BCC2014/3542838 CLF2018/190444
OSF2014/047327

MEMBER: Meredith Jackson

DATE: 22 April 2022

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa

Statement made on 22 April 2022 at 10:43am

CATCHWORDS

MIGRATION – Partner (Migrant) (Class BC) visa – Subclass 100 (Spouse) – genuine and continuing relationship – validly married in home country – limited evidence of household, financial and social aspects of relationship – nature of commitment – sponsor’s ongoing relationship with ex-wife and extent and timing of applicant’s knowledge of it – relationship ceased and claim of family violence – final protection order issued – prior existence of relationship precondition to assessment of claim – not necessary to consider claim – adverse information that applicant trying to secure residency under false pretences – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(a), 5F(2)(a), 65, 359AA, 376
Migration Regulations 1994 (Cth), rr 1.21, 1.23(1), Schedule 2, cl 100.221(2), (2A), (4)(b), (c)
(i)

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 6 July 2018 to refuse to grant the applicant a Partner (Migrant) (Class BC) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant Varinderpal Kaur applied for the visa on 26 June 2014 on the basis of her relationship with her sponsor, Australian citizen Sandeep Singh Dhaliwal, whom she had married in India on 8 January 2014. At that time, Class BC contained Subclass 100. The criteria for the grant of this visa are set out in Part 100 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl 100.221 which requires the applicant to be the spouse or de facto partner of the sponsor unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl 100.221(4)(b), (c)(i).
4. The delegate refused to grant the visa on the basis that the applicant did not meet cl 100.221(4)(b) of the Regulations because the delegate was not satisfied that the applicant was the spouse or de facto partner of her sponsor as defined under sections 5F and 5CB of the Act respectively, prior to the relationship ceasing. Therefore she did not satisfy cl 100.221(4)(b) and cl 100.221 of the Regulations.
5. The applicant sought review by the Tribunal and a hearing was set down for 17 March 2022. On 2 March 2022 the applicant requested a postponement on the basis her representative would not be available on that day. This was accommodated by the Tribunal and a new hearing was set down. The applicant appeared before the Tribunal on 6 April 2022 to give evidence and present arguments.
6. The applicant was represented in relation to the review. The hearing was assisted by an interpreter in the Punjabi and English languages.
7. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

8. BACKGROUND

9. The visa applicant is Ms Varinderpal Kaur, born in 1991 and a citizen of India. The sponsor is Mr Sandeep Singh Dhaliwal, born in India in 1984 and an Australian citizen by grant in January 2013. Mr Dhaliwal was married to Australian citizen Agnes Hanschut in 2008. They had a child in 2010 and were divorced in April 2013. The visa applicant Ms Kaur and Mr Dhaliwal were married in India on 8 January 2014. It was an arranged marriage. Ms Kaur remained in India until after the provisional stage partner visa was granted on 17 April 2015 while Mr Dhaliwal returned to Australia. The delegate's decision, provided by the applicant to the Tribunal, states that on 21 December 2015, Mr Dhaliwal notified the department that the relationship with Ms Kaur had ceased. In 2018, as part of the assessment for the permanent visa, the department contacted him to verify the notification and he advised that the relationship was ongoing and that the parties had reconciled after a few weeks apart. In March 2018 the department contacted the applicant regarding adverse information it had received about the status of the relationship, being that from September 2016 the sponsor had been travelling with, and had declared the same residential address as, his former wife. On 28 March 2018 the applicant responded to the Department, stating that her sponsor had

confirmed he had been conducting an extra-marital relationship with his former wife while married to the applicant.

10. Among the matters considered by the delegate was when the applicant became aware of the extra-marital affair. She had not notified the Department of the breakdown in 2015. The Department said it could be argued she was aware of the infidelity but withheld her knowledge of it in order to help secure a positive migration outcome for herself. On 28 March 2018, the applicant provided evidence to the Department that the relationship had broken down and she had been the victim of family violence.
11. On review, Ms Kaur claims that her husband moved out of their home in March 2018. She does not dispute that the marriage broke down because of the extra-marital affair. She claims she was abused sexually, emotionally and financially from early 2015; that her husband would spend most of his time away from the home and travel frequently to Hungary to visit his daughter, but she did not realise he was having an affair with his ex-wife, the child's mother.
12. Divorce proceedings for the parties are on foot at the time of this decision.

ISSUES AND LAW

13. There is a two-stage process for onshore Partner visas. An applicant must first hold a provisional visa, enabling them to remain in Australia on a temporary basis prior to the grant of a permanent visa. The grant of a permanent visa would generally depend on whether the relationship has continued for a period of at least two years. In this matter, the Tribunal is considering the second, permanent stage.
14. In the present case the applicant claims to have been the spouse of the sponsor but the relationship has now ceased and she has been the victim of family violence.
15. Clause 100.221(4)(c)(i) provides an exception to the requirement that the relevant spouse or de facto relationship is continuing in cl.100.221(2) or (2A) and allows for the grant of the visa where the relationship between the applicant and the sponsor has ceased and the visa applicant has suffered family violence. The prior existence of a relationship, however, is a precondition to an assessment of family violence.
16. Clause 100.221(4)(b) requires that consideration be undertaken at the time the permanent partner visa decision is made of the evidence of the relationship when it existed, to determine its genuineness before its cessation.
17. The issue that arises in this case, therefore, is whether the applicant suffered family violence committed by the sponsor while the relationship was in existence.
18. Under reg 1.23 of the Regulations, a person is taken to have suffered or committed family violence if there is evidence tested before a court; or the visa application includes a non-judicially determined claim of family violence, and either the Minister (or the Tribunal on review) is satisfied that the alleged victim has suffered relevant family violence or an opinion of an independent expert has been given that the alleged victim has suffered relevant family violence. Relevant family violence is defined in reg 1.21. These regulations, as relevant to this decision, are extracted in the attachment to this decision. As stated above, the violence, or part of the violence must have occurred during the relationship: reg 1.23(3), (5), (7), (12), (14).

19. CONSIDERATION OF CLAIMS AND EVIDENCE

20. Whether the parties are in a spouse or de facto relationship

21. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the parties' household, their level of commitment to and support for each other and whether they view the relationship as long term. These matters are set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

22. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The applicant has provided a Punjab Government Marriage Certificate for a marriage between the parties on 8 January 2014. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

23. In forming a view as to whether a spouse relationship existed, the Tribunal has carefully considered each of the specified matters in reg 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship, against the evidence provided, including that in Tribunal and Department files. Some of the evidence in support of the considerations below was provided after the hearing, after the Tribunal granted the applicant time to add information pertaining to the specified matters that had not been provided prior to the hearing.
- *Financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.*
24. In support of the financial aspects of the relationship, the applicant provided, after the hearing, a statement addressing four "pillars" of the relationship, including the financial aspect. She claims therein that she and her sponsor shared a joint bank account which was mainly used to buy things for the house and herself. The two of them wanted to buy a house, she states, but her visa status prevented her from being party to a loan. She stated that the two pooled their incomes from employment into the joint account and bought a car, which was registered in joint names. Registration evidence was provided. The applicant provided bank statements for a joint account held by the parties between September and December 2017, which reflects round-figure transfers from "me" of between \$50 and \$200, and a series of smaller withdrawals for consumables. It does not reflect salary deposits.
25. The Tribunal has considered the evidence before it regarding the financial aspects, including that provided to the Department in support of the visa application, and finds the parties did not own assets or have joint liabilities; that they pooled some of their resources at a minimal level; and shared day-to-day household expenses to some extent. In terms of legal obligations owed to the other party, evidence is provided that dowry obligations have been the subject of dispute between the parties since the breakdown of the relationship and the applicant expects these will be resolved in divorce proceedings. Having considered the

financial evidence, the Tribunal is not convinced that the financial aspects of the relationship were consistent with those of a genuine relationship. Even allowing for cultural inequalities wherein Ms Kaur may not have been an equal partner in the financial arrangements, the evidence submitted and the explanations given pertaining to the financial circumstances are a thin and unconvincing volume, and the Tribunal affords the financial aspects very limited weight.

• *Nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.*

26. At the hearing the applicant stated that the parties lived in three houses in their first year together, including one at Calamvale, where there were just the two of them, and where the lease was in their joint names. In a statement provided after the hearing, the applicant states that the first 16 months after the marriage, however, she lived at her husband's parents' place in India, where she cooked, cleaned, did laundry and washed the animals every day. She states that she nursed and supported her mother-in-law through illnesses and surgery without complaint, and only visited her own family for a total of a month in that time. Once in Australia, she cleaned and cooked at the house they rented in Calamvale. The applicant has not claimed she was involved in the joint care of the sponsor's child from his first marriage at any stage of the relationship, however states she was always open to the child's paternal needs.
27. The delegate's decision, provided by the applicant, states that on 1 March 2018, the applicant was asked to comment on information before the Department that the sponsor, when returning to Australia on occasions between September 2016 and March 2018, claimed to reside in a house in Berrinba. The department noted that the sponsor had travelled overseas with his ex-wife on more than one occasions while married to Ms Kaur and declared the same residential address upon returning to Australia and was listed as an emergency contact for his ex-wife. On 28 March 2018, the applicant responded, confirming that the sponsor was engaged in an extra-marital affair while married to her.
28. The Tribunal accepts that the sponsor was resident with his wife from time to time during their marriage but is mindful that he cited the same residential address as that of his ex-wife when travelling with her, which was not Ms Kaur's residential address. The applicant does not deny that he did not live with her on a full-time basis prior to the breakdown of the relationship. Accordingly, the Tribunal affords the household aspects limited weight.
29. *Social aspects of the relationship – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.*
30. In support of the social aspects of the relationship, the applicant submitted a statement in which she claimed the parties did a lot of things together, such as go to the Sikh temple every Sunday morning, attend parties and conduct gatherings. Photographs of the parties in various social and family settings were provided to the Department and to the Tribunal on review. Ms Kaur states, and the Tribunal accepts, that the parties were for a time recognised as a couple within their community. A wedding ceremony was held in India in 2014 and photographs of guests and a dowry ceremony are provided. Photographs were provided after the hearing of the applicant and others in social settings. In 2016, Form 888 declarations were provided to the Department from family friends, including a statutory declaration from a co-tenant who states the parties shared a home with him and several others. Each declarant attests to a genuine relationship between the couple. The Tribunal affords the social aspects some weight in the applicant's favour.

31. *Nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.*

32. The nature of the persons' commitment to each other in the early stages of the relationship is demonstrated by their marriage. That it was an arranged marriage, the second for the sponsor and the first for the applicant, is acknowledged. Ms Kaur states she was a protected village farm child when she married her sponsor. She points out that in India, marriage is for life, and it is worse than death to be seen as a failure at it, particularly if you are a woman. A "life sentence" in her community awaits if you are a divorced woman. The Tribunal has little doubt about this, and acknowledges it is the case for many women, particularly in rural India. The applicant states that hers was a genuine marriage at the start, and that her commitment to caring for her in-laws in India, a world away from her new husband for more than a year, demonstrates that as she saw it, the marriage was genuine. She claimed at the hearing that her faith in the marriage was jolted early, but it was by a disagreement that saw them briefly separate between 2015 and 2016. She claims to have been shocked and horrified to discover that, as the Department had put to her in March 2018, there was information that her husband was involved in an extra-marital affair with his former wife throughout their marriage.
33. The Tribunal notes the relationship broke up permanently soon after. The applicant on review has stated that she accepts the affair was going on for two or three years while she was in the marriage. She states that during their time together, however, she cared about her husband and he about her. They provided each other emotional support and had good moments during the time they lived together; he would often tell her how much he missed his daughter, who was in Europe, she claims. At this time, she still saw her relationship as long term and continuing, and this was unquestionable in her culture, she claims.
34. The delegate's decision contains statements that the applicant confirmed that her sponsor admitted to engaging in an extramarital relationship with his ex-wife, and that he also resided with her while married to the applicant. The applicant had claimed she was unaware of the infidelity until the Department raised it; the delegate found this to be questionable and raised a possibility that the applicant deliberately obscured the infidelity because it would disrupt her changes of a positive migration outcome. The applicant at the hearing confirmed that she became aware that "he was cheating all along", that he was living with his former wife while also living with her.

35. **Section 359AA**

36. Pursuant to the provisions of s.359AA of the Act, the Tribunal raised with the applicant that Departmental file BCC2014/3542838 contains certain information from a source that is relevant to her case. It is information to which certain limitations apply. The information is covered by a certificate dated 13 August 2018 and issued in according with s.376 of the Act, a copy of which the Tribunal had sent to the applicant prior to the hearing. The effect of the certificate is that if it is valid, the Tribunal has a discretion to release the information. The Tribunal stated it had considered the certificate and considered that it is valid, as it was written by a delegate of the Minister and it specifies a public interest reason why disclosure of the information that is the subject of the certificate would be contrary to the public interest. The applicant acknowledged through her representative that she had received the copy of the certificate and found it to be valid. The Tribunal said it would exercise its discretion and release the 'gist' of the information covered by the certificate to the applicant and ask some questions. While this did not mean the Tribunal had made up its mind about the information, if it were to rely on the information, it would, subject to her comments or response, be the reason or part of the reason, to affirm the decision under review.

37. The gist of the information, the Tribunal stated, was that the applicant was seeking to secure permanent residency under false pretences; that she had filed a false domestic violence case against the sponsor; was threatening consequences for the sponsor's family if she does not get the visa; and that the aim of the marriage was to provide a doorway to Australian residency.
38. The Tribunal stated after outlining the information, that the applicant need not respond immediately, rather she could seek further time to consider it. The hearing was adjourned to the satisfaction of all parties. On resumption, Ms Kaur stated that it was a genuine marriage and she did not marry for permanent residency. She had loved her husband and her intentions were pure. She stated she is finding it harder and harder to cope with the breakdown. On top of everything she had suffered, recently, her cousin brother and uncle were shot dead in her home in India. She stated she did not want to go back to India. In her post hearing submissions, she stated that she was in deep panic and anxiety when she found out that her husband had been having an affair and her health had been severely impacted. While she did not have a great life in Australia, it was better than that she would have in India.
39. The Tribunal put to the applicant at the hearing that the Tribunal had not made up its mind about her relationship's level of commitment; that it appeared there may have been commitment on her part to a long-term relationship, however it had not been fully reciprocated by the sponsor, and it was a condition for the grant of the visa that the relationship had to be mutually exclusive. The Tribunal asked whether the sponsor was living with his ex-wife as well as with her. Ms Kaur responded that it was not her fault: "Why was he living with her as well?" she asked. "He told me I was his servant, I should cook and clean and serve for him."
40. For completeness, a further non-disclosure certificate dated 16 August 2018 appears on the Department file. The Tribunal did not provide the information covered by the certificate to the applicant for the reason that it is largely administrative in nature and the Tribunal considers it not relevant to this decision and places no weight on it.

41. *Protection Order*

42. In the present matter the applicant is seeking to establish family violence on the basis of evidence tested before a court. Acceptable forms of court tested evidence as set out in reg 1.23, are: a court injunction under the Family Law Act 1975; an Australian court order for the protection of the alleged victim; or a conviction or finding of guilt against the alleged perpetrator in respect of an offence of violence against the alleged victim. Where such evidence is provided, the alleged victim is taken to have suffered family violence and the alleged perpetrator is taken to have committed family violence: reg 1.23(1).
43. In support of her claim, the applicant has provided a letter from the Women's Legal Service, the duty solicitor in the matter, stating that the Holland Park Magistrates Court on 2 May 2018 issued a final protection order by consent without admissions. A copy of the consent order has not been provided to the Tribunal however for the purposes of this decision, the Tribunal accepts the evidence in a letter from the attending duty solicitor confirming that such an order naming the sponsor was issued.
44. Ms Kaur claims that the violence in the relationship took many forms and set in early in the relationship. She states the abuse included lying, in that she was kept under the impression that her husband was no longer in a relationship with his previous partner. She states that he often told her he was going on long drives as a truck driver, but instead was carrying on the affair behind her back. She claims she was also threatened by her husband and his family;

she lived in a shelter house for the victims of family violence; and was told by the sponsor that he would kill her if she made any complaints against him.

45. *Conclusion on the nature of the commitment*

46. The parties were together for less than four years. Much of that time was spent either apart, with the applicant remaining in India for the first year, or with three parties in the marriage. It is not disputed that the sponsor in this matter resumed his relationship with his ex-wife while in the relationship with Ms Kaur, and kept it going long-term, while pretending to be the committed spouse of the applicant among friends and in cultural and family fora. Ms Kaur does not dispute that the sponsor was having the affair with his ex-wife while also living with her. She claims credibly that it greatly distresses her however she accepts it as fact. She does not claim that the extra-marital relationship was brief, rather she claims it was probably two or three years in duration, which is most of the time the parties were supposed to be exclusively together. When Ms Kaur first became aware of the infidelity is less clear. She claims she learned of it from the Department. The Tribunal accepts that the Department alerted her to information, but as the delegate points out, the Department did not provide it as fact, yet she responded by confirming it. Her assertion that she did not know about the affair, when it involved such brazen activity such as joint overseas trips and a shared address, is not entirely credible. Whatever the point at which the affair was discovered, its existence is not compatible with the parties seeing themselves as committed spouses in a long-term relationship. In summary, the fact of the affair, accepted by Ms Kaur, overwhelmingly demonstrates a lack of commitment and emotional support from the sponsor towards the applicant for most of the time that the parties were supposed to be developing and securing their relationship. At best, only Ms Kaur was committed to it exclusively.
47. The Tribunal has assessed the financial, household and social and commitment aspects of the relationship and afforded them some light weight. Weight is not afforded in relation to the final consideration, the nature of the commitment, because the sponsor was pursuing an extra-marital relationship with his former wife throughout much of the marriage, if not all of it, which had a devastating effect on its unity. The question of whether Ms Kaur turned a blind eye to her sponsor's infidelity to protect her chances of attaining residency is moot. The applicant and sponsor were in a relationship that was not mutually exclusive; and that is a requirement for the grant of the visa in s 5F(2)(b) and 5CB(a).
48. The Tribunal has considered and weighed the elements of the relationship individually and together, as presented in evidence by the applicant, and is not satisfied the applicant and her sponsor had a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; or lived together and not separately and apart on a permanent basis. Given these findings the Tribunal is not satisfied that the requirements of s 5F(2) or 5CB are met at the time of this decision.
49. The Tribunal is not satisfied, therefore, the applicant was the spouse or de facto partner of her sponsor as defined, prior to the relationship ceasing.
50. Therefore the applicant does not meet cl 100.221(2)(b) and accordingly does not meet cl 100.221.
51. As the prior existence of a relationship is a precondition to an assessment of family violence, and the relationship has ceased, the Tribunal is not required to consider whether the applicant has suffered family violence committed by the sponsor, within the meaning of the Regulations.
52. The Tribunal affirms the decision not to grant the applicant a Partner (Migrant) (Class BC) visa.

Meredith Jackson
Member

ATTACHMENT – EXTRACTS FROM THE MIGRATION REGULATIONS 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in sub regulation (3).
- (3) The matters for sub regulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (I) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (I) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (I) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (I) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in sub regulation (2), the Minister may consider any of the circumstances mentioned in sub regulation (3).